IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 4, 2007 Session

JUANITA MULLINS, individually and as Executor of the Estate of DANIEL V. MULLINS, deceased v. STATE OF TENNESSEE

Appeal from the Claims Commission for the State of Tennessee
No. T-20050482 William O. Shults, Commissioner

No. E2007-01113-COA-R9-CV - FILED JANUARY 24, 2008

Juanita Mullins ("Plaintiff") and her husband, Daniel Mullins, filed a medical malpractice lawsuit in federal court against several doctors, including Dr. Jose Mejia. Dr. Mejia was a fourth-year resident at East Tennessee State University at the relevant time. The lawsuit was brought after Plaintiff's husband had serious complications and injuries following surgery. Plaintiff's husband eventually died. Plaintiff and her husband were residents of Virginia and filed suit in the United States District Court for the Eastern District of Tennessee based upon diversity of citizenship. Plaintiff voluntarily dismissed Dr. Mejia and then filed this lawsuit based upon the alleged medical malpractice of Dr. Mejia against the State of Tennessee (the "State") in the Division of Claims. A jury trial was held in the federal court case, and the jury ruled in favor of all remaining defendants. Although neither Dr. Mejia nor the State were parties to the federal court action, the jury was asked if Dr. Mejia was at fault for comparative fault purposes, and the jury responded "no." After the present case was transferred to the Claims Commission, the State filed a motion to dismiss claiming Plaintiff was collaterally estopped from pursuing the present claim due to the federal court jury's determination that Dr. Mejia was not at fault. The Claims Commissioner denied the motion, and the State appealed. We affirm.

Interlocutory Appeal Pursuant to Tenn. R. App. P. 9; Judgment of the Claims Commission Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, and P. Robin Dixon, Jr., Assistant Attorney General, Nashville, Tennessee, for the Appellant, State of Tennessee.

Travis E. Venable and J.D. Lee, Knoxville, Tennessee, for the Appellee, Juanita Mullins, individually and as executor of the estate of Daniel V. Mullins, deceased.

OPINION

Background

The sole issue in this appeal is whether Plaintiff's medical malpractice claim against the State is barred by the doctrine of collateral estoppel. The underlying procedural facts relevant to this appeal are not disputed. The record in this case begins with the State's motion to dismiss and/or for summary judgment and a memorandum of law in support thereof. The State argued in its motion that Plaintiff is collaterally estopped from proceeding with this lawsuit. The State's memorandum of law sets forth the following facts[1]:

> This is a medical malpractice action in which the State of Tennessee is sued due only to the actions of Dr. Jose Luis Mejia, who was a fourth-year resident at East Tennessee State University at the time of the events alleged in the complaint. Claimant maintains that on January 7, 2004, the deceased, Daniel Mullins, was admitted to Wellmont Valley Medical Center to remove a benign lipoma. She alleges that during the surgery, Mr. Mullins' gastric artery was lacerated and/or damaged by his surgeons, Drs. John Albert Ehrenfried and Michael D. Boggan. Claimant contends that in the early morning hours of January 10, 2006, Dr. Mejia was called to see Mr. Mullins because of hypotension. She maintains that Dr. Mejia acted with less than or failed to act with ordinary and reasonable care in accordance with the recognized standard of acceptable professional practice by failing to properly monitor and/or treat Mr. Mullins after his negligent surgery. In her complaint, the Claimant also states that a suit has previously been brought in the U.S. District Court in Greeneville, Tennessee, against Mr. Mullins' surgeons, Wellmont Holston Valley Medical Center, Michael Floan, R.N., and AMS Health Care Services, Inc. in *Juanita Mullins v. Wellmont Health Systems, et al.,* No. 2:04-CV-375 (E.D. Tenn. Nov. 8, 2006). Dr. Mejia was also named as a defendant in the federal suit, but Claimant voluntarily dismissed Dr. Mejia in the federal court action and filed the instant suit with the Division of Claims. The claim transferred to the Claims Commission on April 7, 2005.
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> On October 31, 2006, the federal case went to trial before a jury in the United States District Court in Greeneville, TN. After a seven day trial, the jury returned a verdict in favor of the defendants on November 8, 2006. In addition to determining the fault of the defendants, the jury was also asked to determine the fault of Dr.

[1] We have omitted any references to the record.

> Mejia, a non-party to the lawsuit. As with the [other] defendants, the jury also determined that Dr. Mejia was not at fault.…
>
> Claimant contends that the alleged negligence of Dr. Mejia contributed to the death of Daniel Mullins. Because the issue of Dr. Mejia's fault in regards to Mr. Mullins' death had been previously decided by a jury in *Juanita Mullins v. Wellmont Health Systems, et al*., No. 2:04-CV-375 (E.D. Tenn. Nov. 8, 2006), this complaint should be barred by the doctrine of collateral estoppel.

The State attached the jury verdict form from the federal court lawsuit as an exhibit to its motion to dismiss. The verdict form asks in separate questions whether Dr. John Ehrenfried, Dr. Michael Boggan, Michael Floan, R.N., or Wellmont Health System were at fault. The jury responded "no" to each question. The fifth question on the jury verdict form was as follows:

> 5. Do you find Jose Luis Mejia, M.D., who is not a party to this lawsuit, to be at fault?
>
> ANSWER YES OR NO _____

The jury's response to this question was "no".

Plaintiff opposed the State's motion to dismiss, emphasizing that Dr. Mejia had been voluntarily dismissed from the federal court lawsuit. According to Plaintiff:

> [Dr. Mejia] did not appear as a defendant during the trial, he was not represented during the trial, nor did he put on any proof through counsel at this trial. In fact, the only appearance that Dr. Mejia had at this trial was as a fact witness called by the Plaintiff.
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> Dr. Mejia's fault in this matter was not decided by the jury panel in the *Mullins* case, as the Plaintiff did not put on any expert proof of Dr. Mejia's fault as he had been removed from the suit. The defendants in the *Mullins* case, even the defendant that originally alleged comparative fault on Dr. Mejia, did not put on any expert proof of Dr. Mejia's fault. Dr. Mejia's name was placed on the jury verdict form, but if any percentage was placed on Dr. Mejia then the Plaintiff would not have recovered that award, as he was not a defendant.…

Following a hearing on the motion to dismiss and/or for summary judgment, the Commissioner denied the State's motion. In so doing, the Commissioner explained that this case involved an important issue because many of the teaching institutions in Tennessee where doctors are trained often treat patients from other states.[2] Thus, in the "unfortunate event of medical malpractice litigation arising out of treatment rendered at these teaching institutions, there is always the very distinct possibility that a case will be filed in a United States District Court because of its diversity jurisdiction." These lawsuits often may well involve claims against medical providers who are not employed by the State, and others who are. The Commissioner explained that as to the claims against the State, those claims must be brought in the Claims Commission where the State has waived its immunity up to $300,000. The Commissioner added:

> The possibility that the Eleventh Amendment to the Constitution may apply in this case is intriguing. Because the substantive law of Tennessee, as enunciated in ***Carroll v. Whitney***, 29 S.W.3d 14 (Tenn. 2004), permitted the inclusion of Dr. Mejia's name on the federal jury verdict form for a possible assessment of fault, the interesting proposition is presented, based on the state's *collateral estoppel* argument, that the federal court has, for all intents and purposes decided the issue of Dr. Mejia's liability in a medical malpractice case which the General Assembly of Tennessee ha[s] reserved to the jurisdiction of the Tennessee Claims Commission.[3]
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> * * *
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> Dr. Mejia's name was included on the Verdict Form returned by the federal jury on November 8, 2006, even though the case had been non-suited as to him by an Order entered on December 3, 2004. Counsel for the Claimants have represented to the undersigned that one of the defendants in the federal trial had requested the federal judge to charge the jury consistent with our Supreme Court's holding in ***Carroll v. Whitney***, 29 S.W.3d 14 (Tenn. 2000) permitting apportionment of fault to a nonparty who is immune from suit.
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[2] The Commissioner explained that interns and residents at the medical centers or medical schools in Johnson City, Chattanooga, Memphis, and Knoxville regularly treat patients who are citizens of different states. For example, the Commissioner noted that medical interns and residents at the Quillen-Dishner School of Medicine in Johnson City regularly treat patients from Virginia and Kentucky. Likewise, interns and residents at Erlanger Medical Center in Chattanooga regularly treat patients from Georgia and Alabama, etc.

[3] In *Carroll v. Whitney*, 29 S.W.3d 14, 19 (Tenn. 2000), our Supreme Court specifically held "that when a defendant raises the nonparty defense in a negligence action, a jury may generally apportion fault to immune nonparties."

> Of course, the Claimants could not have maintained a suit against the State or its employee, Dr. Mejia, in the District Court action. To have done so, would have violated both Article XI of the Constitution of the United States … as well as Article I, Section 17 of the Constitution of Tennessee.
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> * * *
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> There is no evidence before the undersigned that a full evaluation of Dr. Mejia's treatment of Mr. Mullins ever took place in federal court. In particular, the State had not shown that there was even an opportunity for, much less a full consideration of, the merits or de-merits of Dr. Mejia's actions during his management of Mr. Mullins. If Dr. Mejia's conduct had been fully evaluated before the federal jury, I believe that the State would have provided testimony from several fact or expert witnesses regarding Dr. Mejia's conduct. This sort of information is not found in the record before the undersigned. There is good reason that such proof was not developed in the federal court given the prohibitions contained in the State and Federal Constitutions and the limited waiver of sovereign immunity in medical malpractice cases jurisdiction over which the General Assembly has bestowed on the Commission…. (footnote added)

The Commissioner then explained that there was another reason why collateral estoppel should not apply in this case. Specifically, the Commissioner had posited a hypothetical question to the State inquiring as to whether the State would be estopped to challenge the federal jury's verdict if that jury had decided that Dr. Mejia had in fact committed malpractice and assigned fault to him. In one of its briefs filed with the Commission, the State asserted:

> It should be noted, however, that had the jury found Dr. Mejia negligent that there would have been no judgment against him because he was not a party to the lawsuit.

The Commissioner concluded that it would be fundamentally unfair to allow the State to disregard the jury's verdict as to Dr. Mejia had that verdict been unfavorable to the State, but to allow the State, when that same verdict is favorable, to effectively bar Plaintiff from proceeding with the present claim.

After concluding that the doctrine of collateral estoppel did not bar Plaintiff's lawsuit in the Claims Commission from proceeding, the Commissioner stated that due to the expense involved in preparing this litigation for trial, the Commissioner would be "pleased" to grant a request for a Tenn. R. App. P. 9 interlocutory appeal should the State "deem that procedure appropriate." The State did deem that procedure appropriate and filed a motion with the Commission requesting

permission for a Tenn. R. App. P. 9 interlocutory appeal. The Commissioner granted that motion, as did this Court.

The State asserts that the Commission erred when it denied the State's motion to dismiss or, in the alternative, motion for summary judgment. The State claims that all of the elements necessary to estop Plaintiff from proceeding with this case have been met. The State asks this Court to reverse the judgment of the Commission and to dismiss this case.

Discussion

A "question of whether collateral estoppel applies is a question of law, as is the question of whether a prior judgment has res judicata effect." *Tareco Properties Inc. v. Morriss*, No. M2002-02950-COA-R3-CV, 2004 WL 2636705, at *12 n.20 (Tenn. Ct. App. Nov. 18, 2004), *no appl. perm. appeal filed*. *See also In re Estate of Boote*, 198 S.W.3d 699, 719 (Tenn. Ct. App. 2005)("A trial court's decision that a subsequent lawsuit is barred by principles of res judicata presents a question of law which this court reviews de novo."). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

In *Beaty v. McGraw*, 15 S.W.3d 819 (Tenn. Ct. App. 1998), this Court discussed the doctrine of collateral estoppel at length. We stated:

> Collateral estoppel is an issue preclusion doctrine devised by the courts. *See Dickerson v. Godfrey*, 825 S.W.2d 692, 694 (Tenn. 1992); *Goeke v. Woods*, 777 S.W.2d 347, 349 (Tenn. 1989); *Morris v. Esmark Apparel, Inc.*, 832 S.W.2d 563, 565 (Tenn. Ct. App. 1991). Like other preclusion doctrines, its purposes are to conserve judicial resources, to relieve litigants from the cost and vexation of multiple lawsuits, and to encourage reliance on judicial decisions by preventing inconsistent decisions. *See Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 414-15, 66 L.Ed.2d 308 (1980); *Disimone v. Browner*, 121 F.3d 1262, 1267 (9th Cir. 1997).
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> * * *
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> The party seeking to rely on the doctrine of collateral estoppel has the burden of proof. *See Dickerson v. Godfrey*, 825 S.W.2d at 695. To invoke the doctrine successfully, the party must demonstrate:
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> 1. that the issue sought to be precluded is identical to the issue decided in the earlier suit;

> 2. that the issue sought to be precluded was actually litigated and decided on its merits in the earlier suit;
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> 3. that the judgment in the earlier suit has become final;
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> 4. that the party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier suit; and
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> 5. that the party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier suit to litigate the issue now sought to be precluded.
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> At common law, the collateral estoppel doctrine required mutuality of the parties and could only be used defensively. Thus, a defendant traditionally employed the doctrine to prevent a plaintiff from relitigating a claim that the plaintiff has previously litigated against the defendant and lost. The United States Supreme Court expanded the application of the collateral estoppel doctrine in federal courts when it discarded the common-law mutuality of parties requirement. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-333, 99 S.Ct. 645, 649-653, 58 L.Ed.2d 552 (1979).…

Beaty, 15 S.W.3d at 824-25 (footnotes omitted).[4]

We conclude that, at a minimum, the State has failed to satisfy the second and the fifth factors set forth in *Beaty*. The second factor requires the State to show " that the issue sought to be precluded was actually litigated and decided on its merits in the earlier suit." The fifth factor

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[4] *Parklane Hosiery* involved the use of offensive collateral estoppel. In that case, the SEC filed suit against Parklane Hosiery alleging that a proxy statement issued by that company was materially false and misleading. The federal district court found, following a four day trial, that the proxy statement was materially false and misleading as alleged by the SEC. The federal district court's judgment was affirmed on appeal to the United States Court of Appeals for the Second Circuit. *See Parklane Hosiery*, 439 U.S. at 324-25. The question at issue before the United States Supreme Court was whether the federal district court's judgment in the initial lawsuit could be used offensively against Parklane Hosiery in a subsequent stockholders class action lawsuit premised on the illegality of that same proxy statement. The Supreme Court held that it could, stating:

> Since the petitioners received a "full and fair" opportunity to litigate their claims in the SEC action, the contemporary law of collateral estoppel leads inescapably to the conclusion that the petitioners are collaterally estopped from relitigating the question of whether the proxy statement was materially false and misleading.

Id. at 332-33.

the State must establish is "that the party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier suit to litigate the issue now sought to be precluded." Even though the jury verdict form asked the jury to assign fault to Dr. Mejia, neither Dr. Mejia nor the State were parties to that lawsuit. Because the State not only was not a party to the federal court lawsuit but could not be a party to that suit, Plaintiff had no incentive to prove, in the federal trial, that Dr. Mejia had committed medical malpractice because that claim was pending with the Claims Commission. Plaintiff's clear motivation in the federal trial was to cast as much fault as possible on the remaining defendants and not on Dr. Mejia. Plaintiff in the federal court trial never was presented a full and fair opportunity to argue that Dr. Mejia was at fault because Plaintiff was prohibited from suing the State in that lawsuit, and such a claim that Dr. Mejia was at fault would be directly contrary to the claims Plaintiff was allowed to bring in that federal court lawsuit against the remaining defendants. It was the defendants, and not Plaintiff, in the federal trial who had the motivation to attempt to establish Dr. Mejia's fault, thereby reducing the percentage of fault that could be attributed to them.

We also note, at least in the record as presented to us and as found by the Commissioner, that apparently neither the Plaintiff nor the defendants in the federal trial ever presented any required expert proof to the jury as to Dr. Mejia's fault. While the jury did answer the question on the verdict form as to Dr. Mejia's fault, we, as did the Commissioner, find nothing in the record presented to us showing that the issue of Dr. Mejia's fault was actually litigated by the presentation of evidence to the jury in the federal court trial. The State has the burden of proof to show that the issue sought to be precluded, Dr. Mejia's fault, was both "actually litigated and decided on its merits...." The State has failed to meet this burden to show that this issue was "actually litigated" notwithstanding the jury's answer on the verdict form as to Dr. Mejia's fault. While this issue may have been "decided" for purposes of the federal court lawsuit, the State has failed to present any proof that it was "actually litigated" as required.

The State acknowledges in its brief that it "would not have been bound in the Claims Commission by a federal court assessment of fault against Dr. Mejia as neither the State nor Dr. Mejia were parties to the federal court action and thus had no opportunity to defend itself." Just "as neither the State nor Dr. Mejia were parties to the federal court action and thus had no opportunity to defend itself...", neither did Plaintiff have a full and fair opportunity in the federal court trial to argue Dr. Mejia's fault. The present case does not involve a situation where Plaintiff simply nonsuited the State so that Plaintiff could have a second bite at the apple if the result in the federal court trial was unfavorable. All parties agree that the Plaintiff's claim against the State could not be maintained in federal court and that Plaintiff was required to assert that claim in the Claims Commission. Because Plaintiff was prohibited from bringing her claim against the State in the federal court lawsuit, Plaintiff never had "a full and fair opportunity" to litigate the issue of Dr. Mejia's fault in the federal court lawsuit.

The State argues that had Plaintiff originally filed her lawsuit in state court, rather than federal court, then the claim against the State could have been transferred from the Claims Commission to the state court pursuant to Tenn. Code Ann. § 9-8-404(b). Thus, according to the

State, Plaintiff did have a procedural path available to her whereby all of the claims against all of the defendants could have been tried in one trial.

We agree that trying all of the claims together would be preferable for various reasons. However, we find no legal support for the State's position that citizens of other states are required to forego their right to file a lawsuit in federal court based upon diversity of citizenship in order to *possibly* be able to consolidate all of their claims together at a later date in one state court action. Tenn. Code Ann. § 9-8-404(a) & (b)(1999) provide as follows:

> (a) Prior to hearing, upon the petition of either party *showing the approval of the attorney general and reporter*, the claim shall be removed to the appropriate chancery or circuit court with venue for handling in accordance with the provisions of this part, except the normal procedural rules of the court shall be applicable. Appeal from the chancery or circuit court shall be to the court of appeals.
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> (b) The commission *may* transfer the action to the appropriate chancery or circuit court with venue on its own after a determination, in writing, by the commission that fair and complete resolution of all claims involved cannot be accomplished in administrative proceedings before the commission. Such transfers shall be limited to tort claims arising out of the same fact situation where much of the evidence to be presented would be admissible against the state and one (1) or more additional defendants. If such transferred claim is not consolidated for trial, the claim against the state shall be transferred back to the commission. If, prior to the time of trial, all claims other than those against the state have been dismissed, settled or otherwise concluded, upon motion of the state the claim shall be transferred back to the commission. The transferred claim shall be handled in accordance with the provisions of this part, except the normal procedural rules of the court shall be applicable. Appeal from the chancery or circuit court shall be to the court of appeals. (emphasis added)

Pursuant to Tenn. Code Ann. § 9-8-404, a transfer pursuant to subsection (a) requires the consent of the Attorney General and Reporter. Subsection (b) authorizes, but does not mandate, the transfer of claims in certain circumstances. While a transfer pursuant to this statute may be likely in some cases, it is not a guaranteed certainty. *See Hungerford v. State*, 149 S.W.3d 72 (Tenn. Ct. App. 2003)(reviewing the Commissioner's refusal to transfer a case to state court pursuant to Tenn. Code Ann. § 9-8-404(b) pursuant to the abuse of discretion standard). The fact that such a Claims Commission case may end up not being transferred to state court is another reason why it would not be appropriate to require a citizen of another state to relinquish his or her right to file a lawsuit in federal court.

We conclude that the State failed to establish that "the issue sought to be precluded was actually litigated" in the federal court lawsuit and that Plaintiff had "a full and fair opportunity in the [federal court lawsuit] … to litigate the issue now sought to be precluded," i.e., whether Dr. Mejia was at fault. Accordingly, we affirm the judgment of the Commissioner denying the State's motion to dismiss based on collateral estoppel.

Conclusion

The judgment of the Claims Commission is affirmed, and this cause is remanded to the Claims Commission for further proceedings and for collection of the costs below. Costs on appeal are taxed to the Appellant, the State of Tennessee.

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D. MICHAEL SWINEY, JUDGE